Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

ROY MACK WEST,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Whether the Court of Appeals relied upon the wrong standard to calculate the period of time from first appearance through subsequent superseding indictments and replacement indictments to the time of trial which violated 18 U.S.C. § 3161(c)(1), and the indictment against the Petitioner should have been dismissed because the time for trial had expired under the Speedy Trial Act of 1974; and whether a Defendant can waive the right to a speedy trial.

II.

Certiorari should be granted because there is a substantial question of constitutional law concerning the Petitioner's rights under the Fifth and Sixth Amendments where the United States Court of Appeals for the Eleventh Circuit incorrectly failed to reverse the trial court's decision in not instructing the jury to unanimously agree on which of the alleged drug violations constituted the "continuing series of violations."

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Appendix A — Opinion Of The United States Court Of Appeals For The Eleventh Circuit Dated And Filed June 11, 1998 ..... 1a

Appendix B — Order Of The United States District Court For The Northern District Of Alabama, Southern Division Dated And Filed May 31, 1995 And Entered June 1, 1995 ..... 17a

Appendix C — Opinion Of The United States Court Of Appeals For The Eleventh Circuit Denying Petition For Rehearing Dated And Filed October 13, 1998 .. 18a

Petitioner, Roy Mack West, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Eleventh Circuit appears at Appendix A to the petition and is reported at 142 F.3d 1408 (11th Cir. 1998).

The Order of the United States Court of Appeals for the Eleventh Circuit on suggestion of hearing en banc or suggestion of rehearing appears at Appendix C to the petition. It is unpublished.

STATEMENT OF JURISDICTION

The judgment sought to be reviewed was entered in the United States Court of Appeals for the Eleventh Circuit on June 11, 1998, and a copy of the Opinion appears at Appendix A.

A timely Petition for Suggestion of Hearing En Banc or Suggestion of Rehearing was denied by the United States Court of Appeals for the Eleventh Circuit on October 13, 1998, and a copy of the Order denying rehearing appears at Appendix C.

The Order of the United States District Court for the Northern District of Alabama Southern Division appears at Appendix B.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." The Speedy Trial Act of 1974 established specific time limits between various stages of all federal criminal trial proceedings. 18 U.S.C. §§ 3161-3174.

STATEMENT OF THE CASE

Roy Mack West ("West") and two others were indicted in the Northern District of Georgia for a 1984 marijuana sale and a 1985 cocaine sale. West was not arrested. In June, 1993, West was indicted in the Northern District of Alabama in 93-CR-126-E, for a December, 1989 cocaine distribution and conspiracy. In July, 1993, he was indicted in the Northern District of Alabama in 93-CR-148-S for a 1989 violation of Title 18 U.S.C. § 1952.

West was arrested on February 4, 1995, and on April 5, 1995, a federal grand jury for the Northern District of Alabama charged West with engaging in a continuing criminal enterprise ("CCE"), in violation of 21 U.S.C. § 848 (Count 1 or the CCE Count) and conspiracy to possess with intent to distribute and distribution of marijuana, cocaine and methamphetamine, in violation of 21 U.S.C. § 846 (Count 2). This was Indictment No. 95-CR-0091-S.

He was arraigned on April 13, 1995. Fifteen unexcluded speedy trial days elapsed on the pending Indictments. The government filed a motion for continuance on May 4, 1995, to obtain "a more detailed Indictment." The district court granted the motion on June 1, 1995, without making a finding that:

"the 'ends of justice' served by taking such action outweigh the best interest of the public and the defendants in a speedy trial."

On May 5, 1995, the government dismissed 93-CR-148-S, stating that 95-CR-0091-S was a replacement Indictment. Fifteen additional unexcluded speedy trial days elapsed.

On June 7, 1995, Indictment No. 95-CR-0091-S. was superseded, adding a co-conspirator; and on June 15, 1995, West was arraigned. Eight more unexcluded days elapsed. On June 30, 1995, Indictment No. 93-CR-126-E was dismissed as included in Indictment No. 95-CR-0091-S. At the time of dismissal, 139 unexcluded speedy trial days had elapsed. On July 13, 1995, Indictment No. 95-CR-0091-S was again superseded, and West was arraigned on July 20, 1995. A new Indictment expanded the beginning date of the conspiracy to December, 1984, to include the allegations in the pending Georgia Indictment. This count added a new purpose to the conspiracy, 19 means and methods of carrying it out, and 89 overt acts. The overt acts included, among other crimes, the allegations in the two dismissed prosecutions; the pending Georgia cases; and excerpts from the notebook, later to be admitted at trial as an exception to the hearsay requirement. A motion to dismiss, because of speedy trial, statute of limitations violations, and multiple conspiracies, was denied without a hearing.

After the government filed a motion for continuance on May 4, 1995, West filed a waiver of his rights to the time limitations under the Speedy Trial Act Title 18 U.S.C. § 3161(c)(1) on May 26, 1995. In 1995, the court granted the motion for continuance and scheduled the trial to begin on August 7, 1995. Appendix B. On June 7, 1995, the grand jury returned a superseding Indictment that added an additional

defendant to Count 2 and on July 13, 1995 the grand jury returned a second superseding Indictment, "which changed the time period for the offenses and specifically alleged in Count Two the means and methods used in the conspiracy, as well as overt acts in furtherance of the conspiracy."

West made an oral motion to adopt two written motions filed by co-defendants. The court permitted him to do so. The motion, as adopted, stated specifically that the time for trial, which commenced on August 7, 1995, had expired in violation of the defendant's right to a speedy trial and the provisions of the Speedy Trial Act of 1974. The court accepted the motion as timely made and ruled upon it. The Petitioner contended that unexcluded time from each case is added to the unexcluded time on the replacement Indictment, and in this case 177 unexcluded days elapsed prior to trial.

The trial began as scheduled and the jury returned guilty verdicts against West on both counts. The court sentenced West to life imprisonment for his conviction under Count 1 (CCE Count) and vacated the conviction under Count 2 pursuant to *United States v. Nixon*, 918 F.2d 895 (11th Cir. 1990).

The Petitioner filed an appeal with the United States Court of Appeals for the Eleventh Circuit. On June 11, 1998, the United States Court of Appeals for the Eleventh Circuit filed an opinion affirming the convictions. The Petitioner filed a Suggestion of Hearing En Banc or Suggestion of Rehearing with the United States Court of Appeals for the Eleventh Circuit. The Petition for Rehearing was denied on October 13, 1998.

REASONS FOR GRANTING THE WRIT

I.

WHETHER THE COURT OF APPEALS RELIED UPON THE WRONG STANDARD TO CALCULATE THE PERIOD OF TIME FROM FIRST APPEARANCE THROUGH SUBSEQUENT SUPERSEDING INDICTMENTS AND REPLACEMENT INDICTMENTS TO TIME OF TRIAL WHICH VIOLATED 18 U.S.C. § 3161(c)(1) AND THE INDICTMENT AGAINST THE PETITIONER SHOULD HAVE BEEN DISMISSED BECAUSE THE TIME FOR TRIAL HAD EXPIRED UNDER THE SPEEDY TRIAL ACT OF 1974; AND WHETHER A DEFENDANT CAN WAIVE THE RIGHT TO A SPEEDY TRIAL.

In this Court's decision in *Barker v. Wingo*, 407 U.S. 514 (1972), the origins of the right of speedy trial were reviewed and noted to begin with the English Assize of Clarendon in 1166 and the Magna Carta of 1215. The Sixth Amendment to the United States Constitution provides "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed . . ." In cases decided on the constitutional right to a speedy trial, beginning in *Beavers v. Haubert*, 198 U.S. 77 (1905), and continuing with decisions in *Pollard v. United States*, 352 U.S 354 (1957); *United States v. Ewell*, 383 U.S. 116 (1966); *United States v. Marion*, 404 U.S. 307 (1971) and *Dillingham v. United States*, 423 U.S. 64 (1975), this Court has established speedy trial standards that balance the conduct of both the prosecution and the defense. As this Court decided in *United States v. MacDonald*, 456 U.S. 1 (1982), it is to minimize the possibility of long incarceration before trial, to reduce an impairment of the liberty of the accused while released on bail, and to shorten disruption of life caused by arrest for a criminal matter.

Notwithstanding the balancing of interests that the courts have applied to speedy trial claims under the Sixth Amendment, the Speedy Trial Act of 1974, 18 U.S.C. §§ 3161-3174 (1982) established specific time limits between various stages of criminal trial proceedings. The information or indictment must be filed within thirty (30) days of the date of Defendant's arrest or within thirty (30) days of service of summons on the Defendant. 18 U.S.C. § 3161(b). Upon the Defendant's entering a plea of not guilty, a trial must commence within seventy (70) days from the filing date of the indictment or within seventy (70) days from the date the Defendant appeared before a judicial officer in the court in which the charges are pending, whichever is later. 18 U.S.C. § 3161(c)(1). Section 3161(h) of the Speedy Trial Act provides that certain types of delays are excluded from the computation of time expired.

The only remedy for a violation of the Petitioner's right to a speedy trial is dismissal of the Indictment, *Strunk v. United States*, 412 U.S. 434, 438-40 (1973). The Speedy Trial Act has a similar provision. 18 U.S.C. § 3162(a)(2).

18 U.S.C. § 3161(c)(1) requires the defendant to be brought to trial within seventy (70) days of his first court appearance. Sections (h)(1)(F) and (h)(1)(J) exclude periods of delay resulting from other proceedings, including pretrial motions.

West's first appearance on February 9, 1995, started the speedy trial "CLOCK." Two (2) Indictments were pending on return of the new Indictment, which combined the charges from both into a single conspiracy count. The government dismissed the original Indictments. It is important to remember that the two (2) Indictments were pending when the new Indictment was returned. Therefore, there was no time where the Petitioner was not under Indictment. We are not dealing with that situation wherein a Defendant's Indictment is dismissed and weeks or months later a superseding Indictment is returned.

The Court of Appeals in this case relied upon *United States v. Puett*, 735 F.2d 1331, 1333-1334 (11th Cir. 1984). The *Puett* case arose out of the provision in the Act that require the Appellant to be indicted within thirty (30) days *AFTER* arrest. The *Puett* case had nothing to do with the seventy (70) day time limit in which a criminal defendant must be tried.

There is no question that the time between the dismissed and the new Indictment is excluded. This is not the situation in our case.

Here we have two (2) Indictments that are replaced by a third Indictment, combining the same allegations contained in the first two existent at the time of the third. They are not superseding Indictments; they are the same acts combined into a third Indictment, with minor differences, and no time intervening between dismissal of the first two, and issuance of a third indictment.

A superseding Indictment, which merely embellishes earlier charges, or which makes only technical changes, such as accusational dates, will not re-set the speedy trial clock. *United States v. Savage*, 863 F.2d 595 (8th Cir. 1988).

One of the problems in all speedy trial cases is the confusion between the thirty (30) day rule (arrest and Indictment) and the seventy (70) day rule (arraignment to trial). Because the thirty day rule is draconian, when applied, the Appellate Courts have been much more flexible in the interpretation of the thirty day rule than the seventy day trial rule.

In emphasizing the difference between the replacement and superseding Indictment concepts, let us suppose that the criminal defendant is indicted. Sixty-Nine (69) days pass and the government dismisses the Indictment and files a copy of

the first as a replacement for the second. If the Eleventh Circuit's opinion is correct, and *Puett* controls (thirty days), then the government could go on forever — an absurdity.

The Court of Appeals also relies on the Petitioner's waiver of his speedy trial rights. The difficulty of this portion of the Eleventh Circuit's opinion is that the Speedy Trial Act may not be waived. The operation of the Speedy Trial Act may not be suspended by a waiver filed by the Petitioner. This is so because the Act is designed to protect the interests of the public, as well as the rights of the Petitioner:

> The Committee believes that the right of a Speedy Trial belongs not only to the Appellant, but to society as well. A defendant who was charged with a violation of the law becomes a burden to society in the sense that his status consumes the time and energy of all components of the criminal justice system with which he comes in contact: the police, magistrate, clerks of court, probation officers, judges and others. See the Report of the House Committee on the Judiciary, H.R. Rep. No. 1508, 93rd Cong.,2d Sess.15, Reprinted in 1974 U.S. Code Congressional and Administrative News, 7401, 7408. See also, *U.S. v. Ray*, 768 F.2d 991, 998, n.11 (8th Cir. 1985); *United States v. Pringle*, 751 F.2d 419, 433-34 (1st Cir. 1984); *United States v. Carrafquillo*, 667 F.2d 382, 388-90 (3rd Cir. 1982).

This position is certainly supported by the legislative history:

> The committee wishes to state in the strongest possible terms, that any construction which holds that any of the provisions of the Speedy Trial Act is

> waivable by the Appellant, other than his statutorily conferred right to move for dismissal, is contrary to legislative intent and subversive of its primary objective protection of the societal interest in speedy disposition of criminal cases by preventing undue delay in bringing such cases to trial.

S. Rep. No. 212 96 Cong. 1st Session, 2829.

It must follow that a criminal defendant who files a waiver of the Speedy Trial Act — despite the waiver — may move for a dismissal if the act is violated.

However, it is obvious that a Speedy Trial Act waiver may have some significant consequences under the Act. For example, the filing of the waiver itself may cause a delay of the trial. If it does, then the period of this delay, which is due to the conduct of the defense counsel, is excludable time under Section 3161(h)(1). *See Pringle*, 751 F.2d 419 (1st Cir. 1984).

However, causation may not simply be presumed as in the *Pringle* Rule with respect to Section 3161(h)(8) (Restrictions Upon Permissible Continuances).

It is not immediately obvious that a delay caused by the Petitioner's waiver is properly excludable if it would not have been possible for the District Judge, absent the waiver, to grant a continuance at the time under Section 3161(h)(8). It is not immediately obvious that there is sufficient evidence now in the record to support the District Court's conclusion that the delays in this case were caused by the Petitioner's waiver.

To accept the *Pringle* Rule, and were that rule essential to the disposition of our Speedy Trial Act issue, it would be necessary to take up these subsidiary issues, and perhaps to remand for an evidentiary hearing on the cause of the delays.

It is odd that the Petitioner is held to strict compliance as to his Motion to Dismiss, and the government is allowed to plead ignorance of the law itself per the positions set out in *Pringle* above.

Whatever the case may be, it is certain that more than seventy (70) days have elapsed between the first, second, and the third Indictment, which combined the first two, without dismissing either the first or the second.

The time of the first Indictment was June 10, 1993.

The time of the second Indictment was February 9, 1995.

The time of the third Indictment (replacement Indictment) was April 5, 1995.

The waiver occurred on May 26, 1995.

It is also clear that the waiver, insofar as it effects any portion of the Act in this case, could only apply prospectively from the time of the waiver forward. Since it is impossible to waive in the first place, it waiver cannot be retroactive in nature. Any disability arising from a waiver would begin only after the waiver itself.

The United States Court of Appeals for the Second Circuit in *United States v. Lofranco*, 818 F.2d 276 (1987), found that a criminal defendant had waived the right to a speedy trial by entering a plea of guilty. Thus, since dismissal is the only remedy, a guilty plea or a failure of a criminal defendant to assert his rights under the Act are the only exceptions other than his right to a dismissal of the case. 18 U.S.C. §§ 3162(a)(1)-(2).

As stated by Professor Misner in *Speedy Trial Federal and State Practice* (1983):

> Despite statements of a few court opinions to the contrary, it is clear the concept of waiver is anathema to the principles of the Speedy Trial Act. The 1979 Senate Committee Report, in rejecting arguments that waiver by the Defendant of the provisions of the Speedy Trial Act was constitutionally and practically required, states:
>
> > The committee wishes to state, in the strongest possible terms that any construction which holds that any of the provisions of the Speedy Trial Act is waivable by the Defendant, other than his statutorily-conferred right to move for dismissal . . . , is contrary to legislative intent and subversive of its primary objective: protection of the societal interest and speedy dispositional criminal cases by preventing undo delay in bringing such cases to trial.

There is no further discussion of waiver by Professor Misner except to note the Eleventh Circuit's decision in *United States v. DeLonchamps*, 679 F.2d 217, 219 (1982); the only instance in which the court appeared to allow a waiver in certain circumstances. Likewise, in *The Constitutional Right to a Speedy and Fair Criminal Trial,* Warren Freedman discusses no basis for waiver of the speedy trial right by a defendant, particularly not one that would be retroactive. (*See also* J. Andrew Read, *Open Ended Continuances: An End Run Around the Speedy Trial Act*, 5:4 George Mason L. Rev. 733, 752 (1997)).

The district court granted an "ends of justice" continuance without making any specific finding in the record to justify such a continuance under 18 U.S.C. § 3161(h)(8)(a). The failure to do so is fatal in a violation of Petitioner's right to a speedy trial, and the only determination would be whether a dismissal of the indictment would be with or without prejudice, *United States v. Jordan*, 915 F.2d 563 (9th Cir. 1990); *United States v. White*, 864 F.2d 660 (9th Cir. 1998).

II.

CERTIORARI SHOULD BE GRANTED BECAUSE THERE IS A SUBSTANTIAL QUESTION OF CONSTITUTIONAL LAW CONCERNING THE PETITIONER'S RIGHTS UNDER THE FIFTH AND SIXTH AMENDMENTS WHERE THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT INCORRECTLY FAILED TO REVERSE THE TRIAL COURT'S DECISION FOR NOT INSTRUCTING THE JURY TO UNANIMOUSLY AGREE ON WHICH OF THE ALLEGED DRUG VIOLATIONS CONSTITUTED THE "CONTINUING SERIES OF VIOLATIONS."

The Court of Appeals violated the Petitioner's Fifth Amendment right of due process for failure to instruct the jury that they must reach a unanimous agreement that the alleged drug violations constituted a continuing series of violations. The Appellate Court's failure to instruct conceivably ". . . prejudice[d] the defendant in sentencing, in obtaining appellate review, and in protecting himself against double jeopardy." *United States v. Correa Ventura*, 6 F.3d 1070 (5th Cir. 1993) (alteration added). As Justice Blackmun has stated, the "general agreement" of the Federal Courts of Appeals has been that unanimity means that "there is a requirement of substantial agreement as to the principal factual elements

underlying a specific offense." *McKoy v. North Carolina*, 494 U.S. 433, 449 n.5 (1990).

In the context of a CCE charge, the courts have interpreted the term "continuing" to mean that the alleged violations must be related. *See United States v. Jones*, 801 F.2d 304 (8th Cir. 1986) (three separate, unrelated, drug sales would not establish a continuing series); *See also United States v. Baker*, 905 F.2d 1100 (7th Cir. 1990) ("an unrelated conspiracy does not count for CCE purposes because it cannot be part of the continuing series"). Furthermore, it is well settled that the "continuing series" requirement is an element of the crime. *See United States v. Grayson*, 795 F.2d 278 (3d Cir. 1986) (government must prove that a felony violation of the narcotic laws is "part of a continuing series of violations"). Therefore, the jury must have "unanimously" agreed that the Petitioner committed a "continuing" series of three (3) drug-related criminal offenses for the conviction to stand. *See, e.g., In Re Winship*, 397 U.S. 358 (1970).

This Court should find the Third Circuit decisions on this matter persuasive. *United States v. Echeverri*, 854 F.2d 638 (3d Cir. 1988) (CCE conviction reversed for failure of the trial court to give specific unanimity instructions); *United States v. Anderson*, 859 F.2d 1171 (3d Cir. 1988) (failure to charge the jury to unanimously agree results in plain error); *see United States v. Jackson*, 879 F.2d 85 (3d Cir. 1989) (federal CCE statute requires jury unanimity in finding the three offenses necessary to constitute a series). The Third Circuit in *United States v. Edmonds*, 52 F.3d 1236 (3d Cir. 1994), reversed the defendant's CCE count conviction stating:

> The trial court should have instructed the jury that it had to unanimously agree which of defendant's alleged drug violations constituted the "continuing

> series of violations" required for conviction; it was possible that jury, while finding all eight violations occurred, did not actually agree on which violations were related to each other.

Although the court in *United States v. Edmonds*, 80 F.3d 810 (3d Cir. 1996), reinstated the conviction *en banc*, they affirmed the panel's finding that;

> In order to convict a defendant under the CCE statute, the jury must unanimously agree that the same three related acts occurred. Because there is a "reasonable likelihood," *Estelle v. McGuire*, 502 U.S. 62 (1991); *Boyde v. California*, 494 U.S. 370 (1990), that the jury interpreted the district court's general unanimity instruction to require agreement only that *some* three predicate violations occurred and not that the same violations occurred, the district court's failure to give a specific unanimity instruction was error. This error implicates the Sixth Amendment right to unanimous verdict. (Emphasis added).

Other circuits have views similar to that of the Third Circuit. *United States v. Alli-Balogun*, 72 F.3d 9 (2d Cir. 1995); *United States v. Gilley*, 836 F.2d 1206 (9th Cir. 1088) (lack of specific unanimity instruction as to the elements of § 1955 constitute plain error since the number of participants in a gambling operation fell below the statutory threshold, the court held the trial court erred in failing to instruct jurors to specifically agree as to "who did what when"); *United States v. Mangeiri*, 694 F.2d 1270, 1281 (D.C. Cir. 1982), *citing Hack v. United States*, 445 A.2d 634, 641 (D.C. 1982) ("when one charge encompasses two separate incidents, the judge must instruct the jury that if a guilty verdict is returned the jurors must be unanimous as to which incident or incidents they find the defendant guilty").

In the petition before this Court, the jury was not instructed that the violation was required to be part of a continuing series of related drug felonies, or that the jurors had to reach a unanimous verdict that the same three predicate offenses occurred. The required proof was further diluted by the district Judge's instruction, as follows: "[a]nd while the statute does not precisely say, does not say, what the obligation of the government is in the way of proof as to how many of those acts it has to prove." The Petitioner was not charged with any substantive offense from which this Court can conclude that the jury must have reached a unanimous decision that he committed the same predicate offenses. A profusion of other crimes, evidence, innuendo, speculation and hearsay was placed before the jury. In light of the absence of instructions on unanimity, it is unlikely that the jury unanimously agreed on the identity of the underlying offenses. This Court has stated that "[a] verdict is required to be set aside in cases where the verdict is supportable on one ground, but not another, and it is impossible to tell which ground the jury selected." *Yates v. United States*, 502 U.S. 46, 58-59 (1991); *United States v. Collins*, 56 F.3d 1416, 1421 (D.C. Cir.), *cert. denied*, 116 S. Ct. 737 (1995). The error of the trial court was "clear," "obvious" and "affected substantial rights." *United States v. Olano*, 507 U.S. 725, 732-35 (1993). As a result, the failure of the trial court to give a specific charge on unanimity results in manifest injustice and invalidates the verdict since such inaction violates the Petitioner's Fifth Amendment due process rights.

CONCLUSION

This case presents questions of exceptional importance on the issue of speedy trial, the interpretation of the Speedy Trial Act of 1974 and the Petitioner's rights under the Fifth and Sixth Amendments. By granting this petition for certiorari, this Court can correct the Eleventh Circuit's decision.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED JUNE 11, 1998

UNITED STATES of America,
Plaintiff-Appellee,

v.

Roy Mack WEST, a.k.a. Teeny Man,
etc., Defendant-Appellant.

No. 95-6960.

United States Court of Appeals,
Eleventh Circuit.

June 11, 1998.

* * *

Before HATCHETT, Chief Judge, and GODBOLD and RONEY, Senior Circuit Judges.

HATCHETT, Chief Judge:

A jury in the Northern District of Alabama convicted appellant Roy West for engaging in a continuing criminal enterprise. He appeals the district court's denial of his motion to dismiss the indictment based on the Speedy Trial Act and the district court's admission of certain evidence. We affirm.

Appendix A

I. BACKGROUND

In the fall of 1984, the Federal Bureau of Investigation (FBI) in Trenton, Georgia, initiated an undercover drug operation directed at appellant Roy West (West), his brother Sam West (Sam), and their associates. An undercover informant succeeded in making purchases of marijuana and cocaine that West directed. In early 1986, the Northern District of Georgia issued a parole violation warrant, and West became a fugitive. During that year, West traveled with various individuals, including James Brennan, Elizabeth Meadows, Louis Barker, Claude Wayne Cole, Lloyd David Shipley and Robert Douglas Williams. Other members of the organization included West's nephew, Mark West (Mark); West's sister, Patsy West Whited; Steve Wofford; and George Robert Booth.

From early 1988 through mid-August 1989, West hired Brennan and other individuals to purchase or lease property in New Mexico for growing and cultivating marijuana. Brennan purchased three parcels of land, and each became a "ranch." Barker, Cole and Brennan supervised the workers cultivating the fields. West and Mark oversaw the supervisors.

In August 1989, federal and state agents conducted raids on two of the ranches in New Mexico and succeeded in recovering: (1) more than 1,000 marijuana plants; (2) chemicals and glassware used to manufacture methamphetamine; (3) numerous documents and records, including false tax forms; (4) false identifications; and (5) bills of sale for realty and personalty that West and Mark had purchased. The agents arrested Barker and several of the workers during the raids.

At about the same time, West directed Booth, and supplied him money, to purchase additional property in Eskridge, Kansas, to grow marijuana. West also purchased large amounts of methamphetamine and directed that Booth sell or deliver it from Topeka, Kansas, to Birmingham, Alabama, and to other members of the organization. On two occasions, Booth delivered thirteen pounds of methamphetamine to Wofford in Nashville, Tennessee, and twenty-two pounds of methamphetamine to Mark, for $60,000. In November 1989, Booth introduced West to Harold Hall in Chattanooga, Tennessee, from whom West purchased between twenty and twenty-five kilograms of cocaine for $400,000.

A second phase of the West drug organization began in 1991 and continued through the summer of 1993. Shipley purchased between 6,000 and 7,000 pounds of marijuana from Mexican suppliers and delivered it to West in exchange for more than $5,000,000. Shipley transported the marijuana to Bessemer, Alabama, and delivered it to the house and automobile business of Williams. Mark and other individuals unloaded the marijuana from the trucks, while a group including Meadows counted the money. This operation ended with Mark's arrest in October 1993, while he was moving into a house in Pelham, Alabama, with Jack Barry, Jr.

During a search of the house in Pelham, United States Custom Agent Mike Kennedy found a black notebook contained in a gym bag in an unoccupied bedroom. Barry informed the agents that the items in the house belonged to him or Mark. FBI Special Agent Dan Clouse identified the notebook at trial as a ledger containing records of a drug distribution business that was in operation in 1992 and 1993 and that included the sale of almost 6,000 pounds of marijuana with a purchase price

in excess of $5,000,000 and a sale price of approximately $6,000,000. The agents also executed search warrants at Williams's place of business.

The final phase of West's drug enterprise began in 1994. Tracy Wagner, a federal prison escapee, rented a warehouse with Shipley to manufacture large amounts of methamphetamine. West loaned Shipley more than $300,000 to purchase the necessary equipment and chemicals. Based on information from Meadows, law enforcement officers raided the warehouse in February 1995, and discovered two huge cookers, glassware consistent with the manufacturing of methamphetamine, and various chemicals.[1]

On February 4, 1995, law enforcement officials in Hernando, Mississippi, arrested West, and on April 5, 1995, a federal grand jury for the Northern District of Alabama charged West with engaging in a continuing criminal enterprise (CCE), in violation of 21 U.S.C. § 848 (Count One or the CCE count) and conspiracy to possess with the intent to distribute and distribution of marijuana, cocaine and methamphetamine, in violation of 21 U.S.C. § 846 (Count Two).[2] The government filed a motion for continuance on May 4, 1995, and West filed

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1. The government asserts that West and his coconspirators also purchased numerous parcels of property, automobiles and motorcycles throughout the course of the conspiracy in the names of the coconspirators or using fictitious names to conceal the identity of the true owner of the property.

2. The grand jury first indicted West on June 10, 1993, returned a superseding indictment on August 10, 1994, and finally returned a second superseding indictment on February 9, 1995. West, after his February 4, 1995 arrest, appeared February 9, 1995.

a waiver of his rights to the time limitations under the Speedy Trial Act, 18 U.S.C. § 3161(c)(1) on May 26, 1995. On June 1, 1995, the court granted the motion for continuance and scheduled the trial to begin on August 7, 1995.

On June 7, 1995, the grand jury returned a superseding indictment that added an additional defendant to Count Two. On July 13, 1995, the grand jury returned a second superseding indictment, "which changed the time period for the offenses and specifically alleged in Count Two the methods and means used in the conspiracy, as well as overt acts in furtherance of the conspiracy." The trial began as scheduled, and the jury returned a guilty verdict against West on both counts. The court sentenced West to life imprisonment for his conviction under Count One and vacated the conviction under Count Two pursuant to *United States v. Nixon*, 918 F.2d 895 (11th Cir.1990).

II. ISSUES

The issues we discuss are (1) whether the district court erred when it failed to dismiss West's indictment under the Speedy Trial Act; and (2) whether the court (a) abused its discretion in admitting the notebook discovered at the house in Pelham, Alabama, that memorialized drug transactions; and (b) erred when it instructed the jury about the notebook.[3]

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3. West also raises several other issues: (1) whether the court should have dismissed his indictment based on a violation of the statute of limitations; (2) whether the court should have dismissed his indictment because the indictment alleged a single conspiracy instead of multiple conspiracies; (3) whether the court erred in denying West's motion for mistrial; (4) whether the court erred in admitting the testimony of Geving, (Cont'd)

Appendix A

III. DISCUSSION

A. SPEEDY TRIAL

This court reviews claims under the Speedy Trial Act (Act) *de novo*. *United States v. Twitty*, 107 F.3d 1482, 1488 (11th Cir.), *cert. denied*, __ U.S. __, 118 S.Ct. 253, 139 L.Ed.2d 181 (1997). The Act provides that when a defendant enters a plea of not guilty, "the trial . . . shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date is later." 18 U.S.C. § 3161(c)(1). The Act also provides numerous instances of excludable time periods from this seventy-day calculation. *See* 18 U.S.C. § 3161(h). West claims that 177 unexcluded days elapsed between his first appearance and his trial and, therefore, the court erred in not dismissing his indictment.

The grand jury in the Northern District of Alabama first indicted West on June 10, 1993, and he did not appear in court concerning this indictment until February 9, 1995. This first appearance triggered the running of his speedy trial clock. *See* 18 U.S.C. § 3161(c) (1998). On April 4, 1995, the government moved to dismiss West's indictment, after a drug task force grand jury returned a new, "replacement" indictment against him. The court granted this motion, and the grand jury indicted

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(Cont'd)
or in failing to issue a limiting instruction; (5) whether the court erred in denying West's motion for judgment of acquittal; (6) whether the court erred in its jury instructions; and (7) whether the court erred in imposing a mandatory life sentence. We affirm on these issues without discussion pursuant to Eleventh Cir. R. 36-1.

West again on April 5, 1995. According to the Act and case law in this circuit, the government's dismissal of West's original indictment, and the subsequent ("replacement") indictment, triggered a new seventy-day time period. *See* 18 U.S.C. § 3161(d)(1); *see also United States v. Puett,* 735 F.2d 1331, 1333-34 (11th Cir.1984) (stating, "[t]he better construction of section 3161(d)(1) is that after the dismissal of the complaint [by the government], the Act's time limit runs anew from the date of filing of the subsequent complaint or indictment"). The grand jury indicted West one day after the government dismissed the original indictment, and therefore, West's speedy trial clock restarted with the April 5, 1995 indictment.

On May 4, 1995, the government filed a motion to continue West's trial, anticipating that the June 1995 session of the drug task force grand jury would return a superseding indictment against West. On May 26, 1995, West, and his lawyer, executed a waiver of his speedy trial rights, through August 7, 1995. The court granted the government's motion to continue on June 1, 1995, basing its decision in part on the waivers that the defendants filed and their lack of objections to the continuance. At trial, 124 days after the grand jury issued its "replacement indictment," West moved to adopt several motions of codefendant Wofford, including a motion to dismiss the indictment based on speedy trial violations. The court granted West's motion to adopt, but denied all of the underlying motions.

West attacks his waiver, claiming it could not have been "knowing and intelligent" because he and his lawyer executed it beyond his speedy trial limits, and the potential punishment of life incarceration. West and his lawyer, however, executed this waiver well within the limits of the Act (50 days had elapsed

since the April 5, 1995 "replacement" indictment), and he has not presented any other evidence demonstrating that this was not a "knowing and intelligent" waiver.

West also claims that the court erred in granting the government's motion to continue, because it failed to make a specific "ends of justice" finding pursuant to 18 U.S.C. § 3161(h)(8).[4] We review a court's decision to grant or deny a continuance under the Act for abuse of discretion. *United States v. Goetz,* 826 F.2d 1025, 1027 (11th Cir.1987).

The court granted the continuance based in part on the waivers that the defendants filed and their failure to object to the continuance. Further, the grounds listed in the government's motion to continue included: (1) that the grand jury was prepared to issue a superseding indictment; (2) that the government needed more time to compile discovery material; and (3) that the defendants would need additional time to file

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4. Title 18 U.S.C. § 3161(h)(8) reads:

> Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

any necessary motions when they received the discovery materials. While the court's order did not specifically state that the decision was based on the "ends of justice," we find, after a review of the record and the findings enunciated in its order, that the court did not abuse its discretion and that the continuance served the "ends of justice." *See Twitty,* 107 F.3d at 1489-90; *United States v. McKay,* 30 F.3d 1418, 1420 (11th Cir.1994), *cert. denied,* 516 U.S. 924, 116 S.Ct. 323, 133 L.Ed.2d 224 (1995); *United States v. Vasser,* 916 F.2d 624, 627 (11th Cir.1990), *cert. denied,* 500 U.S. 907, 111 S.Ct. 1688, 114 L.Ed.2d 82 (1991).

We therefore find that West validly waived his speedy trial rights, and the court relied on it and other factors in rescheduling a trial to a date beyond the expiration of the seventy-day period.

B. NOTEBOOK

West contends that the court erred in admitting the notebook that Agent Kennedy seized at the house in Pelham, Alabama, in October 1993. The government introduced the notebook into evidence as a coconspirator's statement. Agent Clouse testified at trial as an expert concerning this notebook, concluding that the numerical figures and symbols it contained proved its use as a ledger for drug transactions. West objected to the admission of the notebook, contending that it was hearsay and the court had failed to determine the identity of the author of the notebook, which Federal Rule of Evidence 801(d)(2)(E) requires. We review the admission of the notebook for abuse of discretion, and the court's factual findings that the requirements of rule 801(d)(2)(E) were met under the clearly erroneous standard. *See United States v. Smith,* 918 F.2d 1501, 1510 (11th Cir.1990) (abuse of discretion), *cert. denied,* 502

U.S. 849, 112 S.Ct. 151, 116 L.Ed.2d 117 (1991); *United States v. Alexander,* 850 F.2d 1500, 1505 (11th Cir.1988)(clearly erroneous), *vacated on other grounds,* 492 U.S. 915, 109 S.Ct. 3236, 106 L.Ed.2d 584 (1989), *reinstated as amended,* 888 F.2d 777 (11th Cir.1989), *cert. denied,* 496 U.S. 927, 110 S.Ct. 2623, 110 L.Ed.2d 643 (1990).

Federal Rule of Evidence 801(d)(2)(E) provides that an out-of-court statement of a coconspirator made during the course and in furtherance of the conspiracy is not hearsay, and thus can be offered for the truth of the matter asserted. "When determining whether a coconspirator's statement is admissible . . . a court must be satisfied that there was a conspiracy involving the declarant and the defendant against whom the statement is offered, and that the statement was made during the course of and in furtherance of the conspiracy." *United States v. Allison,* 908 F.2d 1531, 1533 (11th Cir.1990) (citing *Bourjaily v. United States,* 483 U.S. 171, 175, 107 S.Ct. 2775, 2778-79, 97 L.Ed.2d 144 (1987)), *cert. denied,* 500 U.S. 904, 111 S.Ct. 1681, 114 L.Ed.2d 76 (1991). A determination (1) that a conspiracy existed; (2) that the declarant and the defendant against whom the statement is offered were members of the conspiracy; and (3) that the declarant made the statement during the course of and in furtherance of the conspiracy are preliminary questions of fact that the court must determine before a coconspirator's statement can be admitted. *See United States v. Christopher,* 923 F.2d 1545, 1549-50 (11th Cir.1991).

The government argued, and the court believed, that sufficient circumstantial evidence existed, such as the dates reflected in the notebook that coincided with the conspiracy's time frame, to justify the jury's ability to make a logical inference that a coconspirator (Mark West) authored the

notebook. The court, however, clearly erred when it failed to make the preliminary factual determinations that rule 801(d)(2)(E) and the case law from this circuit require. The court never identified the author, or declarant, of the notebook, and was thereby unable to determine if its author was a member of the conspiracy and if the entries in the notebook were in furtherance of the conspiracy. The admission of the notebook, therefore, was an abuse of the court's discretion.

At the end of trial, and when issuing jury instructions, the court erred when it instructed the jury that it could determine whether a coconspirator authored the notebook. *Christopher*, 923 F.2d at 1549-50.[5] Because West failed to object to the

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5. The court issued the following instruction:

> When I allowed into evidence the notebook, which was the subject of testimony by the FBI agent, and which was obtained in the search of the premises which, according to Mr. Berry, he and Mark West were about to move into, that notebook, I allowed it in because I thought you could, if you would, if you wanted to, and it's up to you, not me, if you wanted to, conclude that the notebook was made by a coconspirator. Whether named or unnamed, whether known or unknown, then it could be evidence upon which you could consider and determine the guilt of this defendant. But you see, I didn't decide that it was or was not the work of one of the alleged coconspirators. It's for you to decide . . . In order for you to use that notebook as evidence against the defendant, you must first find that it was the work of and was prepared by (a) one or more — not (a), but one or more coconspirators so that would be the only avenue for it to have been received. So you've got it, but you can't consider it unless you first decide that it was the work and product of some coconspirator or some coconspirators.

court's instructions, however, we must review for plain error. *See United States v. Chisholm,* 73 F.3d 304, 307 (11th Cir.1996) (citing Fed.R.Crim.P. 52(b)).

To satisfy the plain error standard, this court must find that: (1) the district court committed error in its determination; (2) the error was plain or obvious; and (3) the error affected substantial rights in that the error was prejudicial and not harmless. *See Chisholm,* 73 F.3d at 307 (citing *United States v. Ramsdale,* 61 F.3d 825, 832 (11th Cir.1995)). Additionally, if the error meets these three conditions, an appellate court should not exercise its discretion to correct the forfeited error unless the error "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *United States v. Olano,* 507 U.S. 725, 732, 113 S.Ct. 1770, 1776-77, 123 L.Ed.2d 508 (1993) (internal citations omitted).

The court's instructions violate the plain error standard's first two criteria. The court erroneously instructed the jury that it should decide whether a coconspirator authored the notebook, and the "plainness" of this error is apparent on review because the instruction was in contravention of rule 801(d)(2)(E) and case law in this circuit. *See United States v. Kramer,* 73 F.3d 1067, 1074 n. 16 (11th Cir.), *cert. denied,* __ U.S. __, 117 S.Ct. 516, 136 L.Ed.2d 405 (1996); *Christopher,* 923 F.2d at 1549-50; *Allison,* 908 F.2d at 1533-34. The more difficult determination, however, is whether the error affected substantial rights — that is, whether it was prejudicial and not harmless.

West contends that the admission of the notebook and the subsequent instruction supplied the jury with two of the elements required to prove the CCE charge: the related drug violations element (related violations); and the substantial

income element. *See* 21 U.S.C. § 848.[6] He further argues that the figures in the notebook supplied the overt acts needed to satisfy the related violations element.[7] The government contends that the testimony of several witnesses independently proved West's engaging in the CCE.

The government presented overwhelming evidence, through the testimony of several key witnesses, that allowed the jury to find that West committed sufficient overt acts to find that he engaged in the charged CCE. Witness Booth testified that he met with West several times between 1989 and 1990 to discuss the production and transportation of methamphetamine, and the growing of marijuana in Eskridge, Kansas. Witness Meadows testified that she accompanied West often when he arranged transportation for large quantities of marijuana and methamphetamine between 1988 and 1993, and that they also collected money at these deliveries. Witness Brennan testified how he managed one of West's marijuana

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6. The court instructed the jury that the elements of the CCE charge were: (1) a felony violation of the federal narcotics law; (2) as part of a continuing series of violations; (3) in concert with five or more persons; (4) for whom the defendant is an organizer or supervisor; and (5) from which he derives substantial income or resources.

7. The court required that the government prove three overt acts concerning a drug felony in order to satisfy the related violations element. West asserts that eleven of the drug felony overt acts were based on entries from the notebook, including the illustrations of Agent Clouse based on the notebook. West additionally contends that the only evidence concerning felony drug overt acts that was not associated with the notebook occurred before the time period in question, and was therefore time barred. The court rejects these contentions based on the overwhelming evidence of drug felony overt acts the government's witnesses produced.

ranches in New Mexico, and additionally testified about West's authority over several more ranches in New Mexico between 1988 and 1989. Witness Shipley testified that he supplied West with large quantities of methamphetamine, marijuana and cocaine between 1989 and 1993.

Accepting as we must the credibility of these witnesses, we find that their testimony provided firm support for West's conviction on the CCE charge. Moreover, we hold that in light of the overwhelming evidence of West's guilt, the court's instruction to the jury, while plainly erroneous, did not affect West's substantial rights such that it was prejudicial and not harmless. We therefore need not concern ourselves with whether the court's instructions seriously affected the fairness, integrity, or public reputation of the judicial proceedings. For these same reasons, we hold that the admission of the notebook, while erroneous, was also harmless. *See United States v. Stitzer,* 785 F.2d 1506, 1517 (11th Cir.), *cert. denied,* 479 U.S. 823, 107 S.Ct. 93, 93 L.Ed.2d 44 (1986).

IV. CONCLUSION

For the foregoing reasons, we conclude that the district court did not err when it denied West's motion to dismiss his indictment based on the Speedy Trial Act, and that the district court committed harmless error in admitting the notebook as a coconspirator's statement and its subsequent instruction to the jury on that subject. Accordingly, we affirm the judgment of the district court.

AFFIRMED.

Appendix A

RONEY, Senior Circuit Judge, specially concurring:

I concur in the judgment of this Court affirming the district court, although I would hold there was no error in admitting the notebook into evidence. The decision on this point is, of course, dictum: a decision that need not have been made because we decide that any error was harmless. I agree with that controlling decision.

In my judgment, the notebook was admissible in this case despite the uncertainty as to its true author. The plain language of Rule 801(d)(2)(E), and of the Supreme Court's opinion in *Bourjaily v. United States,* 483 U.S. 171, 175, 107 S.Ct. 2775, 2778-79, 97 L.Ed.2d 144 (1987), only required the court to determine that a conspiracy existed between the author of the notebook (whoever that might have been) and the defendant, and that the statements in the notebook were made in furtherance of the conspiracy. This did not require the court to identify which of several potential conspirators actually authored the notebook.

Our circuit and several other circuits, with the exception of the Ninth, have held that anonymous documents which record the activities of a criminal conspiracy may properly be admitted under Rule 801(d)(2)(E) when there is some independent evidence corroborating the reliability of the document. *See, e.g. United States v. Christopher,* 923 F.2d 1545, 1551 n. 3 (11th Cir.1991). *See also United States v. Smith,* 918 F.2d 1501, 1510-11 (11th Cir.1990), *cert. denied,* 502 U.S. 849, 112 S.Ct. 151, 116 L.Ed.2d 117 (1991) (anonymous drug ledgers admissible); *United States v. Dynalectric Co.,* 859 F.2d 1559, 1581-82 (11th Cir.1988), *cert. denied,* 490 U.S. 1006, 109 S.Ct. 1641, 1642, 104 L.Ed.2d 157 (1989) (anonymous phone call made in course

of antitrust conspiracy admissible); *United States v. Mazyak,* 650 F.2d 788, 791 (5th Cir. Unit B 1981), *cert. denied,* 455 U.S. 922, 102 S.Ct. 1281, 71 L.Ed.2d 464 (1982) (logbooks found on a vessel smuggling marijuana admissible); *United States v. Postal,* 589 F.2d 862, 886 n. 41 (5th Cir.), *cert. denied,* 444 U.S. 832, 100 S.Ct. 61, 62 L.Ed.2d 40 (1979) (same); *United States v. McGlory,* 968 F.2d 309, 334-38 (3d Cir.1992), *cert. denied,* 507 U.S. 962, 113 S.Ct. 1388, 122 L.Ed.2d 763 (1993) (handwritten notes found in defendant's garbage admissible against co-defendants even though no handwriting expert identified their author); *United States v. Helmel,* 769 F.2d 1306, 1313 (8th Cir.1985) ("we do not believe that positive proof of the declarant's identity, through handwriting analysis or otherwise, is necessarily essential to the invocation of the coconspirator rule"); *United States v. De Gudino,* 722 F.2d 1351, 1356 (7th Cir.1984) (anonymous lists of illegal immigrants admissible because "the contents of the lists clearly show that their author was familiar with the workings of the conspiracy."). *But see United States v. Gil,* 58 F.3d 1414, 1420 (9th Cir.), *cert. denied,* 516 U.S. 969, 116 S.Ct. 430, 133 L.Ed.2d 345 (1995) (government must prove by a preponderance of the evidence the author of anonymous documents).

The anonymous notebook was found by the police in the home of Mark West, an integral member of the conspiracy, and the entries in the notebook corresponded with drug transactions proved by other evidence at trial. The notebook was properly admissible as the statement of a coconspirator.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION DATED AND FILED MAY 31, 1995 AND ENTERED JUNE 1, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CR 95-AR-91-S

UNITED STATES OF AMERICA

VS.

ROY MACK WEST; ET AL

ORDER

On motion of the United States of America for continuance of June 5, 1995 trial setting, filed May 4, 1995, with no objections by defendants, and in view of the waivers of speedy trial filed by defendants West, Woffard and Williams, the Court hereby GRANTS the motion to continue. The jury trial of the above-entitled and number case is RESCHEDULED for *Monday, August 7, 1995, at 9:00 a.m.*

DONE, this 31st day of May, 1995.

s/ William M. Acker, Jr.
WILLIAM M. ACKER, JR.
U.S. DISTRICT JUDGE

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYINC PETITION FOR REHEARING DATED AND FILED OCTOBER 13, 1998

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 95-6960

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROY MACK WEST, a.k.a. Teeny Man, etc.,

Defendant-Appellant.

On Appeal from the United States District Court for the Northern District of Alabama

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC
(Opinion ____, 11th Cir., 19__, __ F.2d __).

Before: HATCHETT, Chief Judge, GODBOLD and RONEY, Senior Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court

having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ Joseph W. Hatchett
CHIEF JUDGE

(2)

Supreme Court, U.S.
FILED
MAR 12 1999
OFFICE OF THE CLERK

No. 98-1112

In the Supreme Court of the United States

OCTOBER TERM, 1998

ROY MACK WEST, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the delay between petitioner's indictment and the commencement of his trial violated the 70-day time limit of the Speedy Trial Act of 1974, 18 U.S.C. 3161(c)(1).

2. Whether the district court committed plain error in failing to instruct the jury that it must agree unanimously on which particular drug violations constituted the "continuing series of violations" required for conviction for engaging in a continuing criminal enterprise in violation of 21 U.S.C. 848.

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In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-1112

ROY MACK WEST, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 142 F.3d 1408.

JURISDICTION

The judgment of the court of appeals was entered on June 11, 1998. A petition for rehearing was denied on October 13, 1998. Pet. App. 18a-19a. The petition for a writ of certiorari was filed on January 11, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Alabama, petitioner was convicted of engaging in a continuing criminal enterprise (CCE), in violation of 21 U.S.C. 848.[1] He was sentenced to life imprisonment. The court of appeals affirmed. Pet. App. 1a-16a.

1. The Speedy Trial Act of 1974 (Speedy Trial Act) provides that

> [i]n any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs.

18 U.S.C. 3161(c)(1). The Act also states, however, that certain "periods of delay shall be excluded * * * in computing the time within which the trial of any such offense must commence." 18 U.S.C. 3161(h). The Act identifies certain instances in which periods of delay are excluded as a matter of law. 18 U.S.C. 3161(h)(1)-(7).

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[1] Petitioner was also convicted of conspiring to possess with intent to distribute and to distribute marijuana, cocaine, and methamphetamine, in violation of 21 U.S.C. 846. Following petitioner's CCE conviction, the district court vacated his drug conspiracy conviction on the authority of *United States* v. *Nixon*, 918 F.2d 895 (11th Cir. 1990). See Pet. App. 5a. In *Nixon*, the court stated that "when a defendant is convicted and sentenced under a section 846 conspiracy count and a section 848 CCE count, the rule in this circuit has been to merge the two offenses by vacating the sentence *and* conviction of the lesser-included section 846 conspiracy." 918 F.2d at 908.

Those include, *inter alia*, any "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion." 18 U.S.C. 3161(h)(1)(F). The Act further provides for the exclusion of

> [a]ny period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay * * * shall be excludable * * * unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

18 U.S.C. 3161(h)(8)(A).

2. From the late 1980s until his arrest in February 1995, petitioner directed a large-scale drug trafficking organization that distributed marijuana, methamphetamine, and cocaine. Beginning in 1988, petitioner hired co-conspirator James Brennan to purchase three parcels of land in New Mexico to be used as "ranches" for cultivating marijuana. Law enforcement officers raided two of the ranches in 1989 and seized more than 1000 marijuana plants, as well as chemicals and glassware used to manufacture methamphetamine. Petitioner also directed another member of the organization, George Robert Booth, to purchase property in Kansas to be used in growing marijuana. In addition, petitioner purchased large amounts of methamphetamine, which

Booth then sold or distributed to other members of the organization. Booth also introduced petitioner to Harold Hall, from whom petitioner purchased between 20 and 25 kilograms of cocaine. From 1991 through 1993, petitioner purchased between 6000 and 7000 pounds of marijuana from co-conspirator Lloyd David Shipley at a total cost of more than $5 million. In 1994, petitioner loaned Shipley more than $300,000 to purchase equipment and chemicals to be used in manufacturing methamphetamine. Pet. App. 2a-4a.

3. Law enforcement authorities began investigating petitioner's drug trafficking activities in the fall of 1984. Pet. App. 2a. Petitioner became a fugitive in 1986, after a federal district court issued a warrant for his arrest. *Ibid.* On June 10, 1993, a federal grand jury returned an indictment charging petitioner with drug trafficking offenses. *Id.* at 4a & n.2. The grand jury returned a superseding indictment on August 10, 1994, and returned a second superseding indictment on February 9, 1995. *Ibid.* That indictment charged petitioner with one count of violating the Travel Act, 18 U.S.C. 1952(a)(3); one count of conspiracy to violate the Travel Act, in violation of 18 U.S.C. 1952(a)(3) and 371; one count of conspiring to distribute marijuana from on or about the summer of 1988 until on or about September 1989; and one count of conspiring to distribute marijuana from 1991 through 1993. 2/9/95 Indictment 1-5. Petitioner was arrested on February 4, 1995, and he appeared in court on February 9, 1995. Pet. App. 4a & n.2, 6a.

On April 5, 1995, the grand jury issued a new indictment, which charged petitioner with engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848 (Count One), and charged petitioner and several co-defendants with conspiring to possess and distribute

marijuana, cocaine, and methamphetamine, in violation of 21 U.S.C. 846 (Count Two). Pet. App. 4a, 6a-7a. Count Two alleged that the conspiracy had extended "from on or about October of 1986, until on or about the 4th day of February 1995." 4/5/95 Indictment 3.[2] The district court subsequently granted the government's motion to dismiss the February 9, 1995, indictment. Pet. App. 6a-7a.

On May 4, 1995, the government filed a motion to continue petitioner's trial, anticipating that the grand jury would return a superseding indictment against him. Pet. App. 4a, 7a. On May 26, 1995, petitioner executed a waiver of his rights under the Speedy Trial Act through August 7, 1995. *Id.* at 4a-5a, 7a. The district court granted the government's motion for continuance on June 1, 1995, basing its decision in part on petitioner's waiver of his speedy trial rights and his lack of objection to the continuance. *Id.* at 17a; see *id.* at 5a, 7a. The court rescheduled petitioner's trial for August 7, 1995, and the trial began on that date. *Id.* at 5a, 17a. At trial, petitioner moved to adopt several motions filed by one of his co-defendants, including a motion to dismiss the indictment based on alleged speedy trial violations. The district court granted petitioner's motion to adopt his co-defendant's motions, but denied the motion to dismiss. *Id.* at 7a.

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[2] On June 7, 1995, the grand jury returned a superseding indictment that added an additional defendant to Count Two. A second superseding indictment returned on July 13, 1995, changed the time period during which the offenses were alleged to have occurred and added additional allegations to the conspiracy count. Pet. App. 5a. The July 13, 1995, indictment alleged that the offenses had occurred "from on or about December of 1984, until on or about the 4th day of February 1995." 7/13/95 Indictment 1, 3.

4. At the conclusion of the trial, the district court instructed the jurors that in order to convict petitioner on the CCE count, "the government must show beyond a reasonable doubt, one, a felony violation of the federal narcotics laws; two, as part of a continuing series of violations; three, in concert with five or more persons; four, for whom the defendant is an organizer or supervisor; and, five, from which he derives substantial income or resources." Tr. 2369-2370; see Pet. App. 13a n.6. With respect to the "continuing series of violations," the court explained that "while the statute does not precisely say * * * what the obligation is of the government in the way of proof as to how many of those acts it has to prove, * * * it's been developed in the case law of this circuit, that there must be proof of at least three." Tr. 2372. Thus, the court stated, the government "must assert and satisfy you by proof beyond a reasonable doubt that three or more of the acts or transactions" charged in the indictment occurred. Tr. 2373. Finally, after the prosecutor and defense counsel had commented on the jury charge, the court reminded the jurors that to convict petitioner on the CCE count, the government must prove "not only the conspiracy" charged in the indictment "but two other drug felonies." Tr. 2386. The jury convicted petitioner on both counts of the indictment. Pet. App. 5a.

5. The court of appeals affirmed. Pet. App. 1a-16a. Petitioner contended, *inter alia*, that his rights under the Speedy Trial Act had been violated because his trial had not commenced within 70 days after his first appearance in court on the drug trafficking charges, as required by 18 U.S.C. 3161(c)(1). Petitioner argued that 177 unexcluded days had elapsed between his first appearance and his trial and that the district court had

therefore erred in not dismissing the indictment. Pet. App. 6a.

The court of appeals rejected that claim. As an initial matter, the court concluded that although petitioner's first appearance on February 9, 1995, "triggered the running of his speedy trial clock," the government's dismissal of the original indictment and petitioner's re-indictment on April 5, 1995, "triggered a new seventy-day time period." Pet. App. 6a-7a. Thus, the court stated, petitioner's "speedy trial clock restarted with the April 5, 1995 indictment." *Id.* at 7a. The court also held that petitioner had made a valid waiver of his speedy trial rights on May 26, 1995. *Id.* at 7a-8a. The court explained that petitioner had "executed this waiver well within the limits of the Act (50 days had elapsed since the April 5, 1995 * * * indictment), and he has not presented any other evidence demonstrating that this was not a 'knowing and intelligent' waiver." *Ibid.*

The court of appeals likewise rejected petitioner's claim that the district court had erred by granting the government's motion to continue his trial without making a specific finding, pursuant to 18 U.S.C. 3161(h)(8), that the continuance would serve the "ends of justice." Pet. App. 8a-9a. The court noted that the district court had granted the continuance based in part on the defendants' speedy trial waivers and their failure to object to the continuance. *Id.* at 8a. The court observed as well that the government had cited as grounds for the continuance the fact that the grand jury was prepared to return a superseding indictment, the government's need for more time to compile discovery materials, and the defendants' need for additional time to file any necessary motions after they received the discovery materials. *Id.* at 8a-9a. Based on its review

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of the record and the district court's order, the court of appeals concluded that "the [district] court did not abuse its discretion and that the continuance served the 'ends of justice.'" *Id.* at 9a.

The court of appeals also held that the district court had erred in allowing the government to introduce into evidence a notebook containing records of drug transactions, but that the error was harmless in light of the "overwhelming evidence" of petitioner's guilt on the CCE charge. Pet. App. 9a-14a. The court rejected without discussion petitioner's other claims, including his challenges to the district court's jury instructions. *Id.* at 5a n.3.

ARGUMENT

1. Petitioner contends (Pet. 5-12) that he was brought to trial outside the 70-day limit of the Speedy Trial Act. That claim lacks merit and does not warrant this Court's review.

a. Petitioner contends (Pet. 6) that the 70-day period between indictment and trial permitted by the Speedy Trial Act began to run on February 9, 1995, the date of his first court appearance, rather than (as the court of appeals concluded, see Pet. App. 6a-7a) on April 5, 1995, when the grand jury returned a new indictment. Even assuming that the 70-day period began to run on the earlier date, however, petitioner cannot establish a Speedy Trial Act violation.

Under the Speedy Trial Act, any "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion" is excluded from the 70-day period permitted between indictment (or first court appearance) and trial. 18 U.S.C. 3161(h)(1)(F). That provision broadly applies to all

pretrial motions, whether or not they actually cause a postponement of trial. *Henderson* v. *United States*, 476 U.S. 321, 327 (1986) (exclusion is automatic). Moreover, it is well settled that in joint trials, a period of delay resulting from a motion filed by one defendant is excludable as to the co-defendants as well. See, *e.g.*, *United States* v. *Santiago-Becerril*, 130 F.3d 11, 19 (1st Cir. 1997); *United States* v. *Mejia*, 82 F.3d 1032, 1035 (11th Cir.), cert. denied, 519 U.S. 872 (1996); *United States* v. *Neville*, 82 F.3d 750, 763 (7th Cir.), cert. denied, 519 U.S. 899 (1996).

In the instant case, much of the period between February 9, 1995, and August 7, 1995, was excludable because of numerous pretrial motions filed by petitioner and his co-defendants. Those included co-defendant Robert Douglas Williams's Motion for Early Disclosure of Jencks Act Material (filed March 2, 1995), which served to exclude all time between March 2, 1995, and March 15, 1995; co-defendant Leroy Steven Wofford's Motion to Suppress Defendant's Statements or Admissions (filed April 20, 1995), which served to exclude all time between April 20, 1995, and May 19, 1995; co-defendant Williams's Motion for Disclosure of Witness List (filed April 28, 1995), which served to exclude all time between April 28, 1995, and May 27, 1995; co-defendant Wofford's Motion for Disclosure of Government's Intent to Use Rule 404(b) Evidence (filed June 6, 1995), which served to exclude all time between June 6, 1995, and July 5, 1995; petitioner's Motion for Pre-trial Disclosure of Government's Intention to Rely on "Similar Acts" Evidence (filed June 26, 1995), which served to exclude all time between June 26, 1995, and July 25, 1995; and co-defendant Wofford's Motion for Bill of Particulars (filed July 28, 1995), which served to exclude all time between July 28, 1995, and August 7,

1995. See 18 U.S.C. 3161(h)(1)(F) and (J). After those periods are excluded, petitioner's trial commenced within 70 days after his first appearance in court on February 9, 1995. Accordingly, petitioner was brought to trial in conformity with the Speedy Trial Act, even assuming that no new 70-day period was triggered by issuance of the replacement indictment on April 5, 1995.[3]

b. Petitioner also briefly challenges the court of appeals' conclusion that the continuance granted by the district court from June 1, 1995, until August 7, 1995, was a valid "ends of justice" continuance authorized by 18 U.S.C. 3161(h)(8). Although petitioner consented in the district court to the government's motion for that continuance (see Pet. App. 7a), he now suggests (Pet. 12) that the continuance was invalid because the district court failed to make "any specific finding in the record to justify such a continuance." As we explain above, in light of the various motions filed by petitioner and his co-defendants, no Speedy Trial Act violation would

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[3] The court of appeals stated that "the government's dismissal of [petitioner's] original indictment, and the subsequent ('replacement') indictment, triggered a new seventy-day time period." Pet. App. 7a. The suggestion that the filing of the new indictment automatically reset the speedy trial clock appears to be too broad. Under 18 U.S.C. 3161(h)(6), the period between the government's dismissal of an indictment and the later filing of a charge against the defendant "for the same offense, or any offense required to be joined with that offense" is excluded from the computation of time within which trial must commence. That exclusion presupposes that the first (dismissed) indictment for the offense continues to provide the starting time for the speedy trial clock. Despite the apparent overbreadth of the court of appeals' rationale, however, the judgment in this case is correct for reasons apparent from the record, although the government did not rely on those reasons in the courts below.

have occurred even if the district court had not granted the June 1, 1995, continuance.

In any event, the court of appeals was correct in treating the district court's June 1, 1995, order as a permissible "ends of justice" continuance. After examining the record and the district court's order, the court of appeals concluded (Pet. App. 9a) that "the continuance served the 'ends of justice'" and that the district court therefore had not abused its discretion in granting the motion to continue petitioner's trial. When presented with similar circumstances, other courts of appeals have held that a district court need not engage in an explicit balancing of interests if it is clear from the record that it considered the relevant factors and reached an appropriate decision. See, *e.g.*, *United States* v. *Spring*, 80 F.3d 1450, 1456 (10th Cir.), cert. denied, 117 S. Ct. 385 (1996); *United States* v. *Eakes*, 783 F.2d 499, 503-504 (5th Cir.), cert. denied, 477 U.S. 906 (1986); *United States* v. *Wiehoff*, 748 F.2d 1158, 1159-1160 (7th Cir. 1984).[4]

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[4] Petitioner's reliance (see Pet. 12) on *United States* v. *Jordan*, 915 F.2d 563 (9th Cir. 1990), and *United States* v. *White*, 864 F.2d 660 (9th Cir. 1988), is misplaced. In *Jordan*, the court of appeals found a Speedy Trial Act violation where the district court granted an "ends of justice" continuance without "indicat[ing] when, if ever, the continuance would terminate," and then—over a year later—granted a second continuance which extended the defendants' trial date by more than 70 days with "no apparent basis for the exclusion of the time, other than the original ends of justice order." 915 F.2d at 564-566. In this case, by contrast, the district court's order specified the date on which petitioner's trial would begin, and the court of appeals found that the basis for granting a continuance was evident from the record. The Ninth Circuit's decision in *White* is even less helpful to petitioner. In that case, the court of appeals merely remanded for the district court to provide a more detailed explanation of its reasons for dismissing

2. Petitioner also contends (Pet. 12-15) that the district court erred in failing to instruct the jury that it must unanimously agree on which drug violations constituted the "continuing series of violations" required for conviction on the CCE count.[5] That issue is currently before this Court in *Richardson* v. *United States*, No. 97-8629 (argued Feb. 22, 1999). Unlike Richardson, however, petitioner did not object at trial to the district court's failure to give the specific unanimity instruction he now contends was required. Thus, in order to prevail on his claim, petitioner must show that the alleged error was "plain," that it "affect[ed] substantial rights," and that it "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *United States* v. *Olano*, 507 U.S. 725, 732 (1993); see *Johnson* v. *United States*, 520 U.S. 461 (1997). Nevertheless, because the decision in *Richardson* may affect the analysis of petitioner's claim

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the indictment without prejudice after finding a Speedy Trial Act violation. 864 F.2d at 661.

[5] Petitioner asserts (Pet. 15) that "the jury was not instructed that the violation was required to be part of a continuing series of related drug felonies." That statement is inaccurate. The district court instructed the jurors that to obtain a conviction on the CCE count, the government was required to "show beyond a reasonable doubt * * * a felony violation of the federal narcotics laws * * * as part of a continuing series of violations." Tr. 2369-2370. The court later reminded the jurors that the government must prove "not only the conspiracy" charged in the indictment "but two other drug felonies" as well. Tr. 2386. Petitioner's assertion (Pet. 15) that the "required proof was further diluted" by the court's statement that the CCE statute did not specify "what the obligation is of the government in the way of proof as to how many of those acts it has to prove," see Tr. 2372, is likewise unavailing. The district court immediately informed the jurors that "the law of this circuit [requires] that there must be proof of at least three." *Ibid.*

of error, the Court may wish to hold this petition pending its ruling in *Richardson*.

CONCLUSION

With respect to the second question presented, the Court may wish to hold the petition for a writ of certiorari pending the Court's decision in *Richardson* v. *United States*, No. 97-8629, and then dispose of the case as appropriate in light of that decision. In all other respects, the petition should be denied.

Respectfully submitted.

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